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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 122

FRANK PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 134

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 141

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 145

TRUMAN GIBSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 314 F. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1963. A petition for rehearing was denied on March 19, 1963. On April 15, 1963, Mr. Justice Douglas extended the time for filing petitions for writs of certiorari to and including May 18, 1963. Separate petitions for writs of certiorari were filed by Palermo on May 10, 1963, by Sica on May 16, 1963, by Carbo on May 17, 1963, and by Gibson on May 18, 1963.

QUESTIONS PRESENTED

1. Whether the court erred in its charge with respect to declarations of co-conspirators.

2. Whether the recording of a telephone conversation by a state police officer with consent of one party to the conversation constitutes the interception of a communication within the meaning of Section 605 of the Communications Act of 1934, or a viola-

tion of the Fourth and Fifth Amendments of the United States Constitution.

3. Whether electrical recordings corroborating testimony of a principal government witness about a conversation with an unindicted co-conspirator, were properly received in evidence.

4. Whether petitioner Gibson (No. 145) was denied an opportunity to show that Negroes were systematically excluded from the trial jury.

5. Whether an extortion victim may testify that his fears were partly caused by his opinion of the bad reputation of a person assisting in the extortionate demands.

6. Whether various rulings at the trial were proper.

7. Whether there were errors in the instructions.

8. Whether the successor judge, appointed pursuant to Rule 25 of the Federal Rules of Criminal Procedure to perform the remaining duties of the trial judge, who died after verdict, abused his discretion in denying a motion for a new trial.

STATEMENT

The first count of an eleven-count indictment returned in the Southern District of California charged a conspiracy among all petitioners to obstruct commerce by extorting money and obtaining control of the activities of a professional prize fighter, Donald Jordan, from victims Donald Nesseth and Leonard Blakely, also known as Jackie Leonard, in violation of 18 U.S.C. 1951. Count 5 charged a conspiracy to transmit in interstate commerce a communication

threatening to injure Nesseth and Blakely in violation of 18 U.S.C. 875(b). Palermo was charged with substantive violations of these statutes in Counts 2, 4, 6, 8, and 10, Carbo with substantive violations in Counts 3, 7, and 9, and Sica with a substantive violation of Count 4 (1 R. 1-15).[1] Petitioners were convicted as charged. Palermo was sentenced to fifteen years' imprisonment and fined $10,000. Carbo was sentenced to twenty-five years and fined $10,000. Sica was sentenced to twenty years' imprisonment and fined $10,000. Gibson was sentenced to five years' imprisonment, fined $10,000, and placed on probation on his sentence of imprisonment (6 R. 1494-1497, 1499-1500). On appeal, these judgments were affirmed except that the conviction of Sica on Count 5 was reversed, 314 F. 2d 718.[2]

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[1] The record on file with the clerk of the court contains sixty-nine volumes. Volumes 1 through 6 consist of the original papers and proceedings in the district court. Volumes 7 through 16, separately paginated, consist of an abstract of the testimony made by the district court. Volumes 17-68, separately paginated, consist of the trial transcript. Volume 69 contains the proceedings in the court of appeals. In view of the three separate paginations, the record references are preceded by volume number.

[2] Carbo was sentenced to imprisonment for 20 years and fined $10,000 on Count 1 and to imprisonment for 5 years on Count 3, the sentences to run consecutively. He was also sentenced to imprisonment for 5 years on each of counts 5, 7, and 9, to run consecutively to each other. The imprisonment on counts 5, 7, and 9 was made to run concurrently with the imprisonment on counts 1 and 3, making a total of sentence of imprisonment of 25 years.

Palermo was sentenced to imprisonment for 15 years and fined $10,000 on count 1. He was sentenced to imprisonment

In July 1958, Donald Jordan, a prize fighter, achieved ranked fighter status as a welterweight. His manager, Donald Nesseth, prompted Leonard Blakely, known as Jackie Leonard, the matchmaker at the Hollywood Legion Stadium, to match Jordan in a televised bout, almost a prerequisite for reaching the peak in boxing. Leonard arranged several television matches for Jordan through petitioner Truman Gibson, Jr., an officer of the International Boxing Club which had control of the network televising of prizefighting. Leonard leased the Legion Stadium after Gibson, acting for the International Boxing Club, advanced him $28,000 upon future TV fight shows (28 R. 1743-1755; 21 R. 587-588, 592, 612-615).

After Jordan defeated the number one welterweight challenger and was ranked second, Nesseth accepted a rematch on assurances by Gibson that Virgil Akins, the welterweight champion, would fight Jordan. On October 23, 1958, the day after Jordan won the rematch, Nesseth went to the Olympic Auditorium in Los Angeles to arrange with Gibson for the title fight. During the ensuing meeting, attended also by Leonard and others, petitioner Palermo telephoned. He told Leonard: "We are in for half the fighter or there won't be any fight". When

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for 5 years on each of counts 2, 4, and 5, to run consecutively with each other. He was also sentenced to imprisonment of 5 years on each of counts 6, 8, and 10, to run consecutively with each other. The imprisonment on counts 2, 4, and 5 and on counts 6, 8, and 10 were made to run concurrently with the sentence on count 1, making a total term of imprisonment of 15 years.

Leonard related this conversation to Gibson and Nesseth, the latter stated that he would not agree to such conditions. At a second meeting held that day, Gibson indicated that Palermo and petitioner Carbo controlled Akins. Gibson said that "they want all of everything before you can get a welterweight title fight" and "that is the way the welterweight and lightweight title has been worked since Carbo and Blinky [Palermo] got into the picture". When Nesseth refused, Gibson persuaded Leonard to call Palermo and pretend to agree to his terms, assuring Leonard that Gibson would arrange matters so that it would not cost Nesseth any money (28 R. 1756-1762; 21 R. 597-608; 30 R. 2057-2062). Subsequently, Palermo sought confirmation from Leonard that he could control Nesseth (21 R. 615-617). On December 5, 1958, Jordan defeated Akins and became the champion. After the fight Gibson told Leonard: "[w]e really got our necks in trouble now" (21 R. 618-619).

In January 1959, after Palermo sent him $1,000, Leonard met Palermo and Carbo in Miami (21 R. 622, 625, 628-630). Palermo said they now had to arrange a fight between Jordan and Sugar Hart, a fighter whom he controlled. They both wanted assurances from Leonard that Jordan would fight Sugar Hart after a rematch with Akins. Carbo told Leonard that they considered him responsible for handling the situation in California (21 R. 639-647, 671).

On January 22, 1959, Jordan fought another rematch. When Leonard expressed concern to Gibson

about the money which Palermo expected to receive from Jordan's purse on this fight, Gibson replied that Nesseth would not have to pay anything. On January 27, 1959, Palermo telephoned Leonard; he complained about not being paid and accused Leonard of double-crossing him. Carbo took the phone, shouted that Leonard was no good, and that "Just because you are 2,000 miles away, that is no sign I can't have you taken care of". He also said that the money better be paid because "I have got plenty of friends out there to take care of punks like you". This conversation frightened Leonard (21 R. 648-649, 657-659; 29 R. 1796-1799). When Gibson told Leonard he would repay him if he sent Palermo the money, Leonard mailed a personal check for $1,725 to Clare Cori, the wife of Palermo. Leonard was reimbursed by Gibson. Gibson assured Leonard that he could promote some good fights if he would bring Nesseth into line, suggesting that the money involved need not come out of Nesseth's pocket but could be charged off as training expenses (21 R. 660-668, 672-673; 31 R. 2139-2142).

On April 24, Jordan defeated Akins again. Prior to this match, Palermo again told Leonard that Jordan had to fight Hart and that they had to approve Jordan's bouts (21 R. 675). On April 25, after Nesseth had refused to give Palermo a share of the purse, saying that he had never consented to do so (29 R. 1809-1813; 31 R. 2225), Palermo complained to Leonard and said that he "was going to get into a lot of trouble with the people back East." Gibson

said he would give Leonard a check so that Leonard could send the money (21 R. 675-678).

On April 28, in a telephone conversation, Carbo called Leonard a double-crosser, and threatened "that he was going to get somebody to take care of me, that if he was there, he would gouge my eyes out, and I was going to get hurt, and when he meant hurt, he meant dead." Carbo also threatened: "You will never get away with it. I have had that title 25 years and no punks like you are going to take it away from me . . . We will have somebody out there to take care of you . . ." This call frightened Leonard and Nesseth, who was present at the time (21 R. 680-681; 29 R. 1819-1824). Shortly thereafter, when Leonard complained to Palermo about these threats, Palermo responded that they were deserved. Palermo said he planned to send some people to see Leonard. Gibson was informed of these calls (21 R. 681-684; 29 R. 1826-1831).

About four or five days later, Palermo and petitioner Sica met Leonard in Los Angeles. Sica had Leonard and Palermo explain the controversy over Jordan. Sica said that he had been Carbo's friend for years and that Leonard was in serious trouble, that something could happen to him. When Leonard suggested that they should talk to Nesseth to settle the matter, Sica told Leonard to reach Nesseth: "Drag him in, go out and grab him by the neck and get him out of bed and shake him and get him in line". "It is a question of either you or Don Nesseth is going to get hurt . . . If you have to, go out and beat the hell out of Nesseth. If you need any

help we will go with you and help you and drag him out of bed". Palermo and Sica said the problem would be solved if Leonard would convince Nesseth to match Jordan against Sugar Hart. The meeting ended after Leonard agreed to see Nesseth the next morning. Leonard was frightened by Sica's presence because of Carbo's statement that someone would take care of him and because he knew of Sica's reputation as a strong-arm man (21 R. 684-692; 22 R. 721-725, 732-733).

On May 3, Nesseth complained to Gibson of threats and harrassment. He asked Gibson to communicate with Norris, the head of I.B.C., and the television sponsors and inform them of the kind of people with whom they were dealing. Gibson advised him that the pressure could be relieved and Leonard's club saved if Nesseth would agree to match Jordan against Sugar Hart. Nesseth declined such an agreement (29 R. 1828-1831, 1841-1842).

The next morning, May 4, Nesseth walked out of Leonard's office when Palermo entered with Louis Dragna. Palermo told Dragna that Leonard had put him "in the middle" with Carbo when he agreed to pay a percentage of Jordan's purse. Palermo again suggested that Leonard's escape from his predicament would be a match between Jordan and Hart or Flanagan. Dragna told Leonard to settle the matter or "be in a lot of trouble". Leonard's reaction to Dragna, similar to his reaction to Sica, was that he had heard that Dragna was reputed to be connected with the underworld (22 R. 727-731, 734; 29 R. 1833). On the evening of the 4th, Palermo

and Sica called and tried to arrange another meeting with Leonard (22 R. 736-737).

After Nesseth left the office on May 4, he communicated with the Los Angeles police (29 R. 737-738). That evening, the police, with Leonard's consent, recorded a telephone call that Palermo made to Leonard's home (60 R. 6708-6711, Ex. 177). In this conversation, Leonard told of his efforts to influence Nesseth to agree to a Jordan-Hart or Flanagan fight. Palermo said that he had received a message from "our friend" and that he had to call Gibson that evening. Palermo suggested that Leonard come to a restaurant where they could both telephone Gibson. He also said that "Joe" would be there and that William Daly and Gibson planned to take over the Hollywood Boxing Club. When Leonard referred to the hostile call that he had recently received, Palermo started to explain the call but changed his mind (65 R. 7547-7554).

On May 6, Palermo, Sica, and Nesseth met at Leonard's office. Leonard confirmed that he had acknowledged their arrangement with Jordan before "the man" in Miami. Palermo unsuccessfully attempted to persuade Nesseth to agree to a Jordan-Hart match. Nesseth urged a meeting with Gibson and an effort was made to reach him by telephone.[3] That evening, Palermo who had been arrested at the airport by Los Angeles police, denied that he had seen Sica or

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[3] This conversation, recorded by the Los Angeles police, was admitted into evidence without exception by petitioners (32 R. 2334-2338, 2417-2418, 2426-2428; 33 R. 2442-2444).

knew Dragna (58 R. 6217-6218). The next day, Leonard reported to Gibson that Nesseth still refused to match Jordan against Hart (28 R. 1692).

On May 11, 1959, Gibson and William Daly, charged in the indictment as a co-conspirator but not indicted, flew to Los Angeles. Gibson left word with Leonard, who was not in the city, that since he himself had to leave Los Angeles, he was leaving Daly to straighten the matter out (22 R. 750-751).

On May 13, Daly advised Leonard that he was "in a jam," that Norris, Gibson, Carbo, and Palermo were upset. Daly said that if Leonard had talked with him rather than Palermo, Daly would have talked to Carbo and Leonard would not have had to pay any money except on big fights. Daly said that if Leonard could straighten Nesseth out, it might be possible to obtain money to continue operating the Hollywood Boxing Club (22 R. 751-754).

On May 14, 1959, Leonard was invited to Daly's hotel room (*ibid.*) Before going, Leonard was fitted with a minifon recording device and a portable radio transmitter by the Los Angeles police (32 R. 2339-2349). Daly told Leonard that he did not know what he could do for him, that some night Nesseth or he might "hear bang, bang, bang" and either one of them could be dead or hurt; that Ray Arsel who had worked for Carbo had been hit in the head with a pipe. Daly suggested that the best thing to do was to match Jordan with Hart (22 R. 755-761; 6 R. 1357-1413). Recordings of this conversation, made both by the minifon and through the transmitter, were introduced into evidence (32 R. 2343-2344, 2359-2361;

33 R. 2507, 2518-2521, 2525-2527; 60 R. 6696-6702). Prior to admitting the first recording, the court gave the jury a cautionary instruction upon its use (33 R. 2510-2513).

ARGUMENT

1. All petitioners other than Gibson complain that the judge failed to instruct the jury that it should not consider the declarations of one conspirator against a co-conspirator until and unless it was satisfied by independent evidence that the alleged co-conspirator was indeed a member of the conspiracy.

In its general charge, the court stated that "it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such." (66 R. 7654). The judge added that the doing of an overt act was insufficient in itself to authorize conviction but that it was "necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out", and further that there "must be intentional participation in the transaction with a view and purpose to further the common design." (66 R. 7654-7655). The charge continued (66 R. 7655-7656):

> Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made there-

> after pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators may be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

In ruling on exceptions to the instructions, the court recalled that it had inadvertently omitted instructions offered by petitioner Gibson (66 R. 7713). It then charged the jury (66 R. 7714):

> The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants

The court instructed that in considering the guilt or innocence of petitioner Gibson the jury "may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy"

(66 R. 7714-7715). Following the charge, Palermo asserted that Gibson's instruction applied to him and Carbo stated it applied to all defendants. His exception was that the "declarations of the acts of a co-conspirator can't be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declarations, that must be proved by independent evidence." The court responded that it believed this matter was covered in the instructions. Carbo did not think the court had mentioned it but acknowledged he might be mistaken. The prosecutor thought that a full instruction had been given upon the subject. The court then declared that it thought its previous instructions were adequate (66 R. 7719).[4]

There is no doubt that the instruction given as to Gibson is customarily given in conspiracy cases, whatever the nature of the conspiracy charged. See e.g., *Glasser* v. *United States*, 315 U.S. 60, 74. It is

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[4] The various defendants had offered proposed instructions which would have told the jury that before finding a particular defendant was member of a conspiracy, it must find beyond a reasonable doubt that a conspiracy existed and that membership of a particular defendant must be established "without regard to, and independently of, the statements, acts, and declarations of others in his absence." (3 R. 644); that this connection must be established beyond a reasonable doubt by a defendant's own conduct and statements (3 R. 647). Another instruction would have told the jury that the existence of the conspiracy must be established by independent proof based upon a particular defendant's own acts, conduct and declarations (3 R. 646). Another instruction said that in determining whether a person was a conspirator, the jury was not to consider what others have said or done (3 R. 714). See Carbo Pet. 71-73.

unnecessary to agree with the Court of Appeals that such an instruction would *always* be meaningless in a conspiracy case. But we do submit that here such a charge, particularly in relation to the petitioners other than Gibson, would have been largely meaningless and might well have been confusing. That is because, in this case, declarations were the very object of the conspiracy, so that proof of declarations was proof of the conspiracy itself.

Our point is best illustrated by considering the difference between the offense here charged and a conspiracy to commit a common type of crime, such as operating an illegal still. In the latter situation, the object of the conspiracy is an act which does not in itself involve any declaration, and the nature of the conspiracy can be, and usually is, established by showing acts, rather than declarations, such as the finding of the still or the supplies for a still. The participation of conspirator in the enterprise is shown by what he did, as, for example, delivering sugar to the site of the still. In that type of situation it may be meaningful to tell a jury that they must first determine the nature of the conspiracy from evidence other than hearsay statements; that they must determine from independent evidence whether each defendant was a member of the conspiracy; and that only then should they consider against him declarations made by co-conspirators in furtherance of the conspiracy outside of his presence.

But in this case, the object of the conspiracy was to make declarations—threats—and the nature of

the conspiracy could only be established by proving the threats. In short, the declarations were not incidental to the conspiracy charged; they were the heart of it, so that the conspiracy as such could not be shown without showing the declarations. The declarations were verbal acts, as significant to the nature of the crime here charged as the act of taking money would be on a charge of conspiracy to rob a bank. See Wharton, *Criminal Evidence* (12th ed.), par. 257. Under these circumstances, it would not have been accurate to tell a jury generally that no declaration by anyone could be considered against those not present for any purpose until after the jury had found that each individual was a member of the conspiracy. Under the general rule that any relevant evidence, including the overt acts of defendants, may properly be considered by the jury in determining the existence of any underlying purpose or plan,[5] the significant declarations in this case could properly have been considered by the jury as proof of the nature of the conspiracy. Such declarations are not hearsay.[6] In that situation it would only be confusing and serve no real purpose to tell a jury that they could consider the threatening declarations against all defendants for the purpose of estab-

[5] See e.g. *United States* v. *Morris*, 225 F. 2d 91, 95-96 (C.A. 7), certiorari denied, 350 U.S. 901.

[6] Cases such as *Lutwak* v. *United States*, 344 U.S. 604 and *Delli Paoli* v. *United States*, 352 U.S. 232, are not in point. Not only do they involve utterances made subsequent to the termination of a conspiracy but they are concerned with hearsay declarations.

lishing the nature of the conspiracy but that they could not consider the same declarations against non-declarants until they found the non-declarant to be a member of the conspiracy.

The requested instruction would have been particularly meaningless in this case with respect to the petitioners other than Gibson because each one of them did personally make one or more of the declarations which were the verbal acts manifesting the conspiracy, and there is no doubt that the jury so found. As to Carbo and Palermo, the jury found each guilty, not only of the conspiracies charged but of the substantive offenses in which each was named. Each of the substantive offenses was narrowly drawn, limited to a particular charge against one individual based on a specific conversation on a particular date, except Count 4 which charged Palermo and Sica with the May 6 conversation in which they jointly participated. The jury therefore necessarily found that Carbo and Palermo each made the specific threat attributed to him personally. As to Sica, the evidence which connected him with the conspiracy were his threats so that the jury had to find he made the threats to hold him in the conspiracy at all. As noted

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Petitioners' arguments relate to the significant threatening declarations. Neither in the instructions offered, nor in their exception, did they pinpoint any particular conversation which might not fall in this category and which would obviously be insignificant in the light of the facts proved. The court did instruct the jury during the testimony of Leonard that a telephone conversation between Palermo and Leonard in August 1959 should only be considered against Palermo unless it proved any other defendant to be a conspirator (28 R. 1664-1665).

supra, the judge did make it clear that each individual defendant must be found to have joined the conspiracy.

2. The recording of Leonard's conversation with Palermo, obtained by an induction coil on the telephone (see *supra*, p. 10), was played for the jury during the government's case in rebuttal (61 R. 6727) to contradict testimony that Palermo had given on cross-examination (56 R. 6043-6046). It was introduced only after Palermo himself had brought into the case his own recordings of telephone conversations between himself and Leonard (27 R. 1568, 1576; 28 R. 1646-1647, 1652-1653, 1655; 37 R. 3058). All the petitioners contend (No. 141, Pet. 16-20; No. 122, Pet. 5-8; No. 145, Pet. 23; No. 134, Pet. 19) that the telephone recording made in Leonard's home, with Leonard's consent, was inadmissible as in violation of the Federal Communication Act and the Fourth Amendment. They argue that there is a significant difference between hearing a conversation on a regularly used telephone extension and recording a telephone conversation from a single telephone by means of an induction coil.

Listening in to a telephone conversation, with the consent of one of the parties is not, however, either a breach of privacy or a violation of the Communications Act. There is, in our view, no significant difference between this case and *Rathbun* v. *United States*, 355 U.S. 107. The basic rationale of *Rathbun* is that listening in to one end of the conversation is not an "interception" under Section 605 and that neither party to a conversation can prevent the other from disclosing the conversation. Thus, the determina-

tive fact is whether the consent of one party has been obtained. Whether the disclosure occurs contemporaneously with the conversation (as when a living person listens), or later (as here), when the recording is played, is of no significance so long as the disclosure is authorized. Nor is there any reason why the number of telephones of the party making the disclosure, or the mechanical method by which the authorized disclosure is made, should affect the basic rule. The fact that a mechanical recording may be more reliable than a living witness to a telephone conversation is not a valid basis for distinguishing this case from *Rathbun*. See *Carnes* v. *United States*, 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861. See also *Hall* v. *United States*, 308 F.2d 266 (C.A. 5), certiorari denied, 371 U.S. 952; *United States* v. *Williams*, 311 F.2d 721 (C.A. 7), certiorari denied, June 10, 1963.

This is not a case where the recording is used as a substitute for the testimony of live witnesses. Both Leonard and the police officer who made the recording possible testified for the government and could have been examined as to all circumstances leading up to the use of the recording device. Compare *On Lee* v. *United States*, 343 U.S. 747, and the opinion of the Chief Justice, concurring, in *Lopez* v. *United States*, No. 236, 1962 Term, decided May 27, 1963. This case also differs from *Ferguson* v. *United States*, 307 F. 2d 787 (C.A. 10), certiorari granted, June 10, 1963. There the issue is whether intrastate telephone messages, deemed by the State a violation of state statutes, are admissible in a federal court. No claim is made that the recording

here violates state law. Nor is there any issue here of the violation of federal so-called "beep beep" regulation. The tariff regulations covering recording devices claimed to be violated are applicable only to interstate telephone calls, not to intrastate calls such as the one here involved. See *In the Matter of Use of Recording Devices in Connection with Telephone Service*, 11 F. C. C. 1033, 12 F. C. C. 1005. Nor, finally, does this case give occasion for reexamination of *Olmstead* v. *United States*, 277 U.S. 438, where eavesdropping on a telephone conversation without the consent of either party was held not to violate the Fourth Amendment. Here there was no invasion of privacy because a party to the conversation, who could himself testify to the conversation, consented to have it recorded.

3. Petitioners also attack the admissibility of the recordings of conversations between Leonard and unindicted co-conspirator Daly on May 14 in the latter's hotel room, to which Leonard had been invited (No. 141, Pet. 21-22; No. 122, Pet. 8-9; No. 145, Pet. 23, 28; No. 134, Pet. 19). The recordings were made with the use of two instruments carried on Leonard's person, a minifon recording device and a radio transmitter which carried the conversation into a receiver and a recorder in a neighboring room. On that issue this case is governed by *Lopez* v. *United States*, No. 236, 1962 Term, decided May 27, 1963. As in *Lopez*, one of the parties to the conversation, Leonard, testified as a government witness to his recollection of the conversation.[8] Leonard

[8] Daly, the other party to the conversation testified as a defense witness. He gave his version of the conversation,

had been invited to Daly's room and Daly's communications to him were not privileged. There is no question here, as in *Massiah* v. *United States*, No. 199, this Term, as to the admissibility in evidence of a recording of a conversation with a defendant made, in the absence of his attorney, for the purpose of securing admissions, after he has been enlarged on bail pending trial.[9]

4. Petitioner Gibson (No. 145) was not denied an opportunity to show that Negroes were excluded from the jury which tried him. The issue arose when no Negroes appeared among the 50 prospective jurors summoned on the panel to hear the case. Gibson claimed that the 1960 census reports would show that such a panel could not have resulted in the absence of discrimination. Specifically, he offered to show: (1) the 1960 census population statistics by race; (2) the areas where Negroes commonly resided in the district; (3) the methods used to select juries in the district and (4) the racial content of the particular panel (17 R. 89). The clerk and his jury assistant were called by the court. They testified that the bulk of names of prospective jurors came from telephone directories on a mechanical basis and that other names were obtained from the jury commissioner, judges and former jurors. They also related that the questionnaires used did not indicate race and that the names called for this case had been drawn blindly. Gibson declined to question the clerks, giving as his

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claiming that the recording did not cover the entire conversation (38 R. 3126-3131; 39 R. 3286-3288, 3292-3299).

[9] Since Daly's rights were not violated, it is not necessary to discuss the standing of petitioners to object to the recordings. Cf. *Jones* v. *United States*, 362 U.S. 257, 261; *Goldstein* v. *United States*, 316 U.S. 114, 119-122.

reason his objections to the procedure adopted by the court (17 R. 89-96).

The trial court explored the issue sufficiently. The investigation it conducted revealed that racial considerations played no part in jury selection and that the bulk of jurors were selected by chance from telephone directories in the Los Angeles area. It was petitioner's duty in the first instance, if he was serious in his contention, to probe the mater as fully as possible with those persons charged with the duty of jury selection. Failing to do this, he is in no position to complain of the uncontradicted evidence that race played no part in the jury composition. The fact that a particular jury panel contains no Negroes or has a percentage of Negroes less than the percentage of Negroes in the population of a district is not in itself a basis for quashing a jury panel. See *Akins* v. *Texas*, 325 U.S. 398.

5. The indictment, in charging conspiracy to obstruct commerce by extortion, and to transmit threatening communications, alleged that Carbo and Palermo used petitioner Sica and defendant Dragna, known to have underworld reputations, to communicate with Leonard and Nesseth (1 R. 2-4, 9-11). The evidence showed that, after Carbo threatened Leonard with physical harm and told him that he was going to send someone to take care of him, Sica appeared and informed Leonard that he was in trouble and could get hurt; that subsequently Dragna warned Leonard to agree to Palermo's demands or he might be in trouble. Leonard testified that he was frightened of the two men because of their underworld reputations and Nes-

seth also testified as to the reputation of the men (22 R. 722, 734; 29 R. 1865-1866). When the court first admitted this testimony, it told the jury that a bad reputation might or might not be deserved and that the jury must determine if Leonard was afraid and if the situation was "reasonably calculated to produce" fear (22 R. 722-724). At the close of the case, the court charged that this evidence was admitted to show the state of mind of Leonard and Nesseth (66 R. 7698-7699, 7706-7708).

The evidence was properly admitted for the limited purpose for which it was offered, to show the state of mind of the persons threatened. *Callanan* v. *United States*, 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862. Soft words by a person of power can be more threatening than big talk by a weak and ineffective individual. Thus it was proper to show that Carbo and Palermo attempted to play on Leonard's fears by sending two individuals whose presence, coupled with threats, could compel compliance with their extortionate demands.

6. Complaints of various other rulings at the trial are without merit.

(a) Petitioners assert error in testimony by Nesseth and Jack McCoy that Leonard told them of Carbo's threats (No. 141, Pet. 27-28; No. 134, Pet. 25-26). This testimony was admissible to show Leonard's state of mind. *United States* v. *Varlack*, 225 F. 2d 665, 673 (C.A. 2). If the petitioners wished this testimony to be limited, it was incumbent upon them to offer such an instruction.

(b) On direct examination Leonard testified that in October or November 1959, he had received a message from his wife (who had gone to Philadelphia) to telephone Palermo, and that he had not authorized his wife to contact Palermo. On cross-examination, the defense developed the fact that Leonard had been willing to accept $25,000 from Palermo in order to flee the country and avoid testifying (25 R. 1265), and introduced tape recordings of some telephone conversations between Palermo and Leonard (28 R. 1653-1655). In closing argument, the prosecutor conceded that Leonard and his wife had decided prior to her trip to Philadelphia that if Mrs. Leonard obtained some money from Palermo, Leonard would attempt to leave the country (63 R. 7055). Subsequently, in closing argument, the prosecutor stated that he did not apologize for Leonard who was the victim of circumstances and that "there has been no effort to bring before you the testimony of a perjuror" (65 R. 7529). Petitioners claim (No. 141, Pet. 29-30; No. 134, Pet. 26; No. 145, Pet. 26-27) that they were denied due process because the prosecutor did not concede before the jury that Leonard had been impeached and because he argued before the successor judge that Leonard was "completely truthful" (67 R. 7950).

The prosecutor's statements obviously referred to Leonard's testimony as a whole. The fact that Leonard may have been inconsistent in some of the details of his testimony did not compel the prosecutor to concede that he had been impeached or was not worthy of belief. This is not a case where important facts were

hidden from the jury. The false statement of which petitioners complain was brought to the attention of the jury, and such inconsistencies were for the jury in their appraisal of the testimony.

(c) After the defense had developed the discussions as to the $25,000 offer to Leonard, the government brought out the fact that Leonard had received telephone calls between May 20 and November 1959, which had frightened him. In one call, in August 1959, Palermo told him that he should change his mind about the case and that there would be money waiting for him. The contents of the other calls were not introduced (28 R. 1657-1667). Contrary to petitioners' contention (No. 141, Pet. 28, 30-31; No. 134, Pet. 27), this evidence was admissible to show that Leonard was motivated by fear when he offered to flee the country.

Chargin, a boxing promoter, had negotiated with Leonard to take over the operation of the Hollywood Boxing Club (31 R. 2225-2226). After the meeting on May 6, Sica asked an assistant to Leonard where he could reach Chargin (31 R. 2206). On June 4, the day before he planned to fly to Los Angeles, Chargin received a telephone call in which the caller, who knew his flight number, advised him to stay out of Hollywood and told him "You saw what happened to Jack Leonard" (31 R. 2239). As the court below ruled, the trial judge had discretion to admit this conversation as bearing on the general atmosphere of fear that pervaded the actions in this case. In any event, this minor shred of evidence, even if improper, could not have affected the outcome of this long trial.

(d) Sica's defense witness, Tom Stanley (Salvatore Casarona), a boxing manager and promoter, testified that in early 1960 Leonard mentioned his wife's visit to Palermo and asked Stanley to act as an intermediary to obtain the money from Palermo so that Leonard could leave the country (36 R. 2864-2865). In rebuttal, Leonard testified that, a number of times after the May 6 meeting, Stanley told Leonard that he should not ally himself with Nesseth (59 R. 6355-6358, 6373). Twice in the middle of June 1959, Stanley came to Leonard's office with one Calla. When Leonard asked who Calla was, Stanley replied that he was a friend of Sica who had been convicted of murder (59 R. 6361-6367). In late 1959, Stanley, after referring to the Philadelphia visit of Leonard's wife, told Leonard that he could obtain a large sum of money for Leonard if Leonard could clear all the defendants and Leonard agreed to give Stanley a percentage (59 R. 6374-6383).

Petitioners claim error in the admission of Leonard's testimony about Calla (No. 141, Pet. 33; No. 134, Pet. 27-28). However, as with respect to the telephone calls to Leonard, the relationship with Stanley, including the conversation about Calla, showed a constant, although subtle, pressure on Leonard. The jury was entitled to consider this evidence in determining Leonard's motives in seeking to avoid testifying.

(e) Sica, who testified in his own behalf, admitted on direct examination that he had been convicted of two felonies (52 R. 5357). On cross-examination, the government brought out a third felony conviction (52

R. 5363). The prosecutor then asked him if he had been convicted of a conspiracy to violate a particular section of the California Penal Code, basing the question on the fact that his exemplified copy of the judgment showed that the crime was a felony, and that, in any event, the conviction was for a crime involving moral turpitude. The court determined that this was not a proper conviction for impeachment purposes and instructed the jury to disregard the question (52 R. 5363-5372). A motion by Sica for a mistrial was denied by the court (52 R. 5408-5414). Its exercise of discretion in this respect presents no issue warranting review.

(f) Gibson claims (No. 145, Pet. 29-30) that, as a matter of law, he should have been acquitted because his conviction is based on the declarations of his co-conspirators. The evidence shows, however, that Gibson was informed of the threats made by the others, and that he knowingly gave his "informed and interested cooperation" to furthering the conspiracy. See *Direct Sales* v. *United States*, 319 U.S. 703. The jury thus had ample basis to hold him liable as a conspirator.

7. Various claimed errors in the instruction are without merit.

(a) Gibson (No. 145, Pet. 26) claims that the court erred in failing to give his requested character instruction (instruction F) which would have told the jury "that an established reputation for good character alone may create a reasonable doubt" as to his

guilt. The court did instruct the jury that reputation evidence has great value in certain cases, and that the jury should consider whether a person having a reputation such as Gibson would commit the type of offense charged (66 R. 7695-7699). After the court gave its instructions, Gibson renewed his request for 11 of the special instructions that he had requested. He did not, however, renew his request for the reputation instruction which he had offered (66 R. 7729).

We submit it would be unrealistic to instruct the jury that a reputation for good character should alone generate a reasonable doubt in all circumstances. The nature of some crimes is such that they are frequently committed by persons of previously impeccable reputation. It is for the jury to decide whether the crime is such that it might be committed by a person of good reputation and to decide what weight to give to the reputation of the defendant in the light of all the circumstances in the case.

There is, it is true, a conflict in the circuits as to whether a court must in every case charge that good character alone may create a reasonable doubt, but this Court has not heretofore regarded this conflict as of sufficient importance to require resolution. See *e.g. Moore* v. *United States*, 254 F. 2d 213 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C.A. 6), certiorari denied, 352 U.S. 1025; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800. In

this case, the charge actually given was justified in relation to the facts at issue.[10]

(b) Petitioners argue (No. 122, Pet. 9-10; No. 141, Pet. 32-33) that there was plain error in the court's instructions because there was "a studied and conscious effort to avoid the words 'not guilty' and 'acquit' ". If petitioners thought the jury listening to the charge would be left with such an impression, they should have brought the matter to the court's attention in their exceptions. A reading of the charge as a whole indicates that it is not weighted for a finding of guilt (66 R. 7634-7704).

(c) There is likewise no plain error in the court's instructions as to an appeal (No. 141, Pet. 33). The court made it clear that the jury's findings of fact were not subject to review (66 R. 7635).

8. The trial in this case lasted from February 20, 1961, until May 30, 1961. After the jury returned its verdict the trial judge, Judge Tolin, denied as to petitioners[11] the motions for judgment of acquittal

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[10] Gibson's contention that he was prejudiced because his counsel was not apprised of the instructions prior to argument is without merit (No. 145, Pet. 25). He was not misled by the character instruction given. The court had advised Gibson that it would give an instruction on character evidence but not in the language offered (61 R. 6784-6785). The court, while rejecting all instructions tendered as being prolix, did tell counsel that if they would pull out the few instructions they particularly wanted, it might give them and would so inform counsel (61 R. 6786-6793).

[11] The court stated it wished to examine the evidence as to Dragna and expressed a possibility that his motion might be granted (66 R. 7805-7807).

as to which he had reserved decision. The successor judge, who made a nine volume abstract of the trial testimony (8 R. to 16R), denied post-trial motions for a new trial which alleged, *inter alia*, that the verdict was contrary to the weight of the evidence (4 R. 962, 965, 978; 6 R. 1446, 1491).

Neither the conflict in the testimony nor the fact that Gibson, Sica and Palermo testified and denied their guilt makes it mandatory, or an abuse of discretion, as petitioners contend (No. 141, Pet. 13-16; No. 134, Pet. 17-18; No. 145, Pet. 30-34) for a successor judge to act on their motions for a new trial. It is the function of the jury, rather than the trial judge, to weigh the evidence, and particularly to judge the credibility of witnesses. A trial judge would be justified in taking the issue of credibility from a jury, if at all, only in the situation where the witnesses for the government had been so completely discredited that no reasonable man could believe them. That was not this case, and the trial judge who heard this case obviously did not think so since he had already denied the motion for acquittal.[12]

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[12] In *Connelly* v. *United States*, 249 F. 2d 576 (C.A. 8), certiorari denied, 356 U.S. 921, which has a dictum upon which petitioners rely, the trial judge had not at the time of his death ruled upon the motion for judgment of acquittal filed at the close of all the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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